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The 'But For' Test and Other Devices – The Role of Hypothetical Events in the Law

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Abstract: *»Der ‚But for'-Test und andere Behelfe – Die Rolle hypothetischer Geschehensabläufe im Recht «*. The law can be regarded as a fact-orientated system of rules for the social steering of human behaviour. Included are rules for adequate reactions to contravening behaviour. In such cases, the actual conduct of a person – what he or she is doing or has done *in fact* – is the central element of all considerations. In so far, however, as such facts need to be ascertained or evaluated, e.g. in litigation, it can be helpful and sometimes even necessary to juxtapose and compare real events and developments with alternate, counterfactual ones. (In legal parlance the latter are usually *'hypothetical'* events or developments.) This is true, in particular, in the contexts of questions as to causation and damages. The paper is intended to give some illustrations, mainly taken from German and English law, and to show how considerations of a *counterfactual* nature can be useful tools for solving problems as to *facts*.

Keywords: Law, tort law, criminal law, damages, compensation, causation, condicio sine qua non, hypothetical events, hypothetical developments, standard of proof.

A.

The law, as everybody knows, is based on facts – one is not liable or punishable for acts one could have done or would have done or might do, but for acts one actually did.

The whole complex and multi-layered 'law machine' with its police-officers, magistrates, prosecutors, lawyers, juries, judges, not to forget forensic scientists and the like, serves, as everybody knows (not least the avid followers of CSI Miami or Professor Boerne in Münster), to whittle down all the conflicting evidence to the solid proof of the true facts.

B.

One might think, therefore, that there is no place for anything counterfactual in the law, and yet, thumbing through the German civil code, for example, one surprisingly often stumbles upon the word "würde" (that is, 'would'), thus

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referring to something hypothetical, i.e. non-factual. "Würde" appears more than a hundred times throughout the whole code, and not only in marginal, seldom used sections, but also in central and important ones.

An example is sect. 249, which contains basic principles of the German law of damages. If I negligently bump my car into yours, you can demand either to have your car repaired or to be paid the money necessary for repair. This is straightforward enough in most situations. But let us assume I didn't bump into your car, but – while driving too fast and trying to avoid a pedestrian – veered off the road into your garden, smashing a tiny cherry tree there which you had planted just recently and which would still have needed a few years of growth before actually bearing cherries for the first time. Let us further assume that – for whatever reason: perhaps some dispute between insurance companies – this leads to a protracted lawsuit going through several levels of appeal over a period of five years until you are finally awarded damages. I suppose you would then not be really happy if I brought you a small tree identical to the one I had destroyed so many years earlier, for you would then again have to wait years for your first cherries, whereas you could already have a decent cherry harvest, had the original tree been allowed to go on growing. Section 249[1] of the civil code therefore does not oblige me to re-create the state of affairs as it was (i.e. a very young tree), but to create (or pay for the equivalent of) the state of affairs as it *would* be now, a state of affairs which equals the hypothetical state of affairs without the accident, i.e. a five year old tree, one with cherries now. In other words: I have to turn the hypothetical, counterfactual situation into a real, factual situation (or its financial equivalent).

The problem, of course, is to determine the relevant hypothetical state of affairs. In the case of the tree this doesn't seem to be too difficult: cherry trees tend to grow and eventually carry cherries. Nevertheless, maybe there was a severe winter four years ago and a virulent cherry tree disease three years ago, either of which might have killed this particular cherry tree anyway before it could produce any cherries. In other words: there is not one alternative history, so to speak, but there are several quite conceivable ones, so which one should we pick? Let us assume that half of all young cherry trees in the region perished during these five years for one reason or another. Should this be taken into account when assessing damages, and if so, how?

Smashing fledgling cherry-trees is not, of course, an everyday occurrence and not a particularly serious affair anyway. So why should we bother to make a big theoretical issue out of it? The reason is that the same kind of problem arises in situations which, unfortunately, are all too frequent and serious.

Take as an example a sixteen-year-old boy with average marks at school, with an already long list of minor and some middling criminal offences and

[1] § 249 BGB: See Appendix I and Note thereto.

with an exceptional talent for football. The boy gets hit by a reckless driver, only just survives, and has to spend the rest of his life in a wheelchair, unable to do much at all.

With the state of medical science as it is, no meaningful 'repair' is possible. So the only thing the law can provide is financial compensation. This comes under several headings: medical expenses, pain and suffering, and others. One of them is 'future loss of earnings'. But what are the future earnings the boy has lost? Average earnings for an average job after average marks at school? Or would he have embarked on a continuously unsuccessful criminal career with most of his life spent in prison and hardly any earnings at all? Or do we speak about the millions of a world class football player?

The job of the court then, if litigation arises, is not only to take into account a hypothetical situation, but to evaluate and compare several hypothetical situations and to decide on their hypothetical relative probability – a kind of hypothetical prognosis.

Different legal systems around the world do this in different ways (McGregor 1983, 107ss, 129; Stoll 1983, 22ss, suppl. 6ss). Some, for example, prefer a more objective approach, based on ordinary or average developments. Others have a far-reaching subjective approach, trying to indemnify the victim as exactly as possible with regard to the concrete individual circumstances, even if they lead – hypothetically – to quite unusual results. Some apply different rules for contractual and tortuous liability, some for civil liability for crimes and for non-criminal torts. I am not aware, however, of any legal system managing without recourse – one way or another – to hypothetical situations and developments in these types of cases.

This is not really surprising, for the operative words are "in these types of cases". Both examples I have used as illustrations so far are compensation cases, with undisputed facts as to the injuries of the victim's body or the damage to his property, but with the calculation of an adequate compensation as the issue. Here, the very word 'compensation' points to the explanation why this is a problem. The central ingredient in the word is the latin root 'pend', signifying something hanging down, and referring in this context to a pair of scales (Stowasser 1966, 363; OED 1987, 490). Weighing with balance scales is a method of comparison. The object to be weighed is placed in one pan, and standard weights are added to the other pan until the beam is as close to equilibrium as possible. Both, the object to be weighed and the standard weights are real objects, facts, so to speak. In compensation cases of the type discussed here, however, we have only one set of facts, the boy in the wheelchair without an income, for example. So, what do we put in the other pan to know what we have to add as damages into the first pan to reach equilibrium? There is no other way than to somehow resort to non-factual, to hypothetical situations and developments, otherwise the second pan of the balance would remain empty and we would have no measure against which to calculate damages.

For this reason, everything I have said so far, though perhaps unexpected by the CSI audience, is not really controversial among lawyers – in many details, yes, but not in principle.

C.

Let us therefore shift the focus of our attention from the damages for an injury to the injury itself. Here we are in the realm of pure facts, surely? Indeed, I think generally we are. Nevertheless, hypothetical considerations are applied by many lawyers, and in some contexts such considerations must be applied.

To be liable in damages for an injury you must have injured the victim. To be punishable for a crime you must have committed the crime. In other words: you must have brought about such a state of affairs as corresponds with the elements in the definition of a specific tort or crime, its 'Tatbestand', or, as it is called in English criminal law, its 'actus reus'. If such a state of affairs is the result of your acts, you are said to have 'caused' the result.

Now, the concept of 'causation' is one which has vexed philosophers, scientists and others for a long time (Weber 1997, 66 et seqq). Is causation a 'fact' of the physical world, a sequence of events linked by energy transfer, perhaps (Vollmer 1983, 104)? Or is the linking of 'act' and 'result' something which occurs in the mind of the observer only? Or is it something else altogether?

From a purely legal point of view 'causation' raises two main questions. First: what exactly is a 'cause' in the law? And second: if 'causation' is a requisite element of the tort or crime in question – how does one recognise it and, if necessary, prove it?

As to what is 'cause', the main dividing line among lawyers is between those with a narrow (or strong) and those with a broad (or weak) understanding of the notion of 'cause' (Honoré 1983, 44ss). Assume a jogger negligently bumping into an old lady who falls down and breaks a leg. Brought into hospital, the old lady dies in a fire raised by a mad arsonist. Has the jogger caused the death of the old lady? The adherents of a narrow notion of 'cause' look for the 'causa causans', the 'proximate cause', the 'adequate cause', the one and only relevant cause for the injury, thereby importing aspects of fault (such as e.g. foreseeability) and considerations of legal policy into the understanding of 'cause'. For them the jogger has not caused the death of the old lady because her death in a fire was not an adequate result of bumping into her or was not foreseeable for the jogger. The adherents of a broad notion of 'cause' want all these additional evaluative criteria like adequacy or foreseeability to be treated as separate elements of the tort or crime, not to be confounded with 'cause' in a purely factual understanding, thus accepting, as a starting point, a multitude of causes for every single occurrence, the relevant one to be found by eliminating the irrelevant ones, irrelevant because the sequence of events of which they are a part lacks at least one of the further requisite elements of the tort or crime.

For them, the jogger would have 'caused' the death of the old lady, but would probably not be responsible for it for lack of one of the evaluative criteria.

In spite of these differing understandings of 'cause', most lawyers of both schools, however, agree that the cause or a cause must at least be a condition, a 'condicio sine qua non'[2] of the result in question, e.g. the injury (Honoré 1983, 106ss).

Now, how do you recognize a 'condicio sine qua non' when you come across one? English legal text books (e.g. Rogers 2006, 6-3ss) have found a catchy phrase for the method to be applied according to most lawyers: the 'but for' test. An act is a cause of the result if the result would not have happened but for the act: the boy would not be sitting in a wheelchair but for the reckless driver hitting him.

German legal textbooks (e.g. Medicus / Lorenz 2008, 309) often describe the same method, somewhat less succinctly, as "hinwegdenken", 'thinking away': if you cannot think the act away without the result vanishing as well, then the act is a cause of the result.

In other words: the factual, the real sequence of events is to be compared with a counterfactual, a hypothetical one, completely equal in their respective starting points 'but for' the one act in question.

This method is standard procedure, so to speak, in cases of doubtful causation or in order to eliminate in a first step all definitely irrelevant acts, and occasionally – though not as a general rule – we even find it laid down in statutory provisions[3]. And indeed – the 'but for' test is a very practical rule of thumb, a useful rough and ready guide to determine an act as a cause in the sense of a condition. Nevertheless, it is not reliable in all situations (Weber 1995, 88), and so the law textbooks have to add qualifications to it: Sometimes an act is to be regarded as a cause although the 'but for' test gives a negative answer. Let us assume that two factories, both located near the same lake, independently of each other discharge toxic liquids into the lake. All the fish perish. The intake from each factory alone was sufficient to kill everything in the lake. If we now apply the 'but for' test to factory A we would have to conclude that their behaviour was not causal for the damage, because all fish would have perished anyway, due to the behaviour of factory B – and vice versa. Each of them, A *and* B would have to be acquitted. Obviously, in cases like this, the 'but for' test excludes too much. On the other hand, it can include too much. To take an example from the extra-legal sphere: thunder is always preceded by lightning. 'But for' the lightning there is no thunder. So – has the lightning caused the thunder? Well, it has not. Both, lightning *and* thunder, are caused by a third occurrence, an electric discharge. We hear the thunder after we see the lightning only because light travels faster than sound, but lightning

[2] As to spelling: see Bonnet 1972.

[3] E.g. § 848 BGB (German civil code): see Appendix II.

and thunder are not causally connected to each other although the 'but for' test gives a positive answer.

So, although the 'but for' test, referring to a hypothetical situation, does play – in a limited sense – a useful role for establishing causation, it is therefore no panacea and strictly speaking non-essential. In different contexts, however, hypothetical considerations of a similar type are not only useful, but indeed inevitable.

So far we have talked about unlawful *acts*. But what about those situations in which you have *not* acted although you should have done so, in other words, what about omissions? In many countries, for example, it can be a criminal offence for everybody *not* to intervene when seeing a child drowning in a nearby pond in the park[4]. And probably everywhere it is a tort for the responsible person to forget to cover a manhole in a public street after finishing road works if a pedestrian falls into the hole and is injured. Have the bystander in the park and the road worker caused the death of the child and the injuries of the pedestrian? Not in a strict sense. Both have done nothing. They do not appear in the chain of events leading to the death and the injuries. But they should have done something. They should have acted to prevent the result. If they had acted as they should – pulled the child out of the pond, covered the manhole – would then the respective result have been avoided? With this question we apply a kind of 'bur for' test in reverse, not 'thinking away' something which happened, but hypothetically 'thinking in' specific acts which had not happened. In other words, we have to construct an alternative, a counterfactual course of events, to judge in the end whether or not to hold the bystander or the road worker responsible for the real, the factual result.

Similar considerations can be necessary in yet other situations, for example in the context of certain defences (Honoré 1983, 126ss). It may be a defence against a claim for paying damages if one can show that, although one has clearly caused some damage, the damage *would* have occurred anyway, that is, if there is a so-called 'Reserveursache', a reserve or default cause. Take, as an example, a guest in a hotel who negligently breaks the window of his room, when an earthquake half an hour later results in the destruction of all windows in the whole area. Had the guest not destroyed that particular window, the earthquake would have done so. Or it may be a defence to show that, although one clearly has caused some damage while acting unlawfully, the damage *would* have occurred even if one had acted lawfully: for example a drunken driver hits a pedestrian who suddenly steps from the pavement into the road – would a sober driver have been able to avoid the pedestrian?

[4] E.g. § 323 c StGB (German penal code): see Appendix III.

D.

It would be interesting to discuss these and further aspects of counterfactual thinking in the law in more detail, not least the intriguing second question raised above: how do you, if necessary, prove a hypothetical event or development, something counterfactual, of which, by its very nature, there can be no witnesses, no documents, no fingerprints, no DNA samples?

Determining one particular hypothetical course of events as the relevant alternative may obviously require differing approaches from proving a fact, and this has indeed been acknowledged even in some statutes, for example in the German civil procedure code which contains two sections on the standard of proof[5], one laying down the general and very stringent rules in sect. 286 and another one, sect. 287, which gives the court more leeway and is widely understood to contain a reduced standard of proof, a degree of probability instead of certainty in the eyes of the judges. Sect. 287 expressly refers, among other things, to ascertaining whether damage has occurred and what the extent of the damage is – in other words exactly to the sort of questions we have discussed here, questions where considerations about hypothetical developments can or must be applied – so that arguably sect. 287 gives the correct standard of proof for hypothetical developments in general (Weber 1995, 195-197).

But my allocated time is up – so let me come to the end and to a conclusion which, after all I have said, cannot be in doubt: there *is* a role for counterfactual thinking in the law, and that role is by no means an insignificant one. The terminology is different: the word 'counterfactual' will hardly ever be found in a legal text; in general some phrasing including the adjective 'hypothetical' will probably be found to be used. But whatever the terminology: in the law this kind of thinking is certainly not a parlour game, not about fantasy or entertainment, but a valuable and sometimes an essential tool and therefore, perhaps unlike the position in some of the other fields covered in this conference, basically quite uncontroversial – a tool which serves, perhaps ironically, to analyse and to evaluate the actual facts.

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[5] §§ 286, 287 ZPO (German civil procedure code): see Appendix IV.

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Appendix

I. § 249 BGB

§ 249 BGB: Art und Umfang des Schadensersatzes

(1) Wer zum Schadensersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre.
(2) Ist wegen Verletzung einer Person oder wegen Beschädigung einer Sache Schadensersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen. Bei der Beschädigung einer Sache schließt der nach Satz 1 erforderliche Geldbetrag die Umsatzsteuer nur mit ein, wenn und soweit sie tatsächlich angefallen ist.

Section 249: Nature and extent of damages

(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.
(2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a

thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.).

English translation by Langenscheidt Translation Service: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section 249 (16-02-2009)

Note: This English version is somewhat misleading insofar as the word "herstellen" is translated as "restore" (which would be "wiederherstellen" in German), thus confusing the point that subsection 1 is not about the re-creation of the old position, but about the creation of a (possibly quite different) new position.

II. § 848 BGB

§ 848 BGB: Haftung für Zufall bei Entziehung einer Sache

Wer zur Rückgabe einer Sache verpflichtet ist, die er einem anderen durch eine unerlaubte Handlung entzogen hat, ist auch für den zufälligen Untergang, eine aus einem anderen Grunde eintretende zufällige Unmöglichkeit der Herausgabe oder eine zufällige Verschlechterung der Sache verantwortlich, es sei denn, dass der Untergang, die anderweitige Unmöglichkeit der Herausgabe oder die Verschlechterung auch ohne die Entziehung eingetreten sein würde.

Section 848: Liability for chance in connection with deprivation of a thing

A person who is obliged to return a thing of which he has deprived another person by a tort is also responsible for accidental loss, for a chance impossibility of restitution for another reason or for accidental deterioration of the thing, unless such loss, other impossibility of restitution or deterioration would have occurred even without the deprivation.

English translation by Langenscheidt Translation Service: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section 848 (16-02-2009)

III. § 323c StGB

§ 323c StGB: Unterlassene Hilfeleistung

Wer bei Unglücksfällen oder gemeiner Gefahr oder Not nicht Hilfe leistet, obwohl dies erforderlich und ihm den Umständen nach zuzumuten, insbesondere ohne erhebliche eigene Gefahr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.

Section 323c: Failure to Render Assistance

Whoever does not render assistance during accidents or common danger or need, although it is required and can be expected of him under the circumstances and, especially, is possible without substantial danger to himself and without violation of

other important duties, shall be punished with imprisonment for not more than one year or a fine.
English Translation provided by the German Federal Ministry of Justice: http://www.-iuscomp.org/gla/statutes/StGB.htm#323c (16-02-2009)

III. §§ 286, 287 ZPO

§ 286 ZPO: Freie Beweiswürdigung:

(1) Das Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei. In dem Urteil sind die Gründe anzugeben, die für die richterliche Überzeugung leitend gewesen sind.
(2) An gesetzliche Beweisregeln ist das Gericht nur in den durch dieses Gesetz bezeichneten Fällen gebunden.

§ 287 ZPO: Schadensermittlung; Höhe der Forderung

(1) Ist unter den Parteien streitig, ob ein Schaden entstanden sei und wie hoch sich der Schaden oder ein zu ersetzendes Interesse belaufe, so entscheidet hierüber das Gericht unter Würdigung aller Umstände nach freier Überzeugung. Ob und inwieweit eine beantragte Beweisaufnahme oder von Amts wegen die Begutachtung durch Sachverständige anzuordnen sei, bleibt dem Ermessen des Gerichts überlassen. Das Gericht kann den Beweisführer über den Schaden oder das Interesse vernehmen; die Vorschriften des § 452 Abs. 1 Satz 1, Abs. 2 bis 4 gelten entsprechend.
(2) Die Vorschriften des Absatzes 1 Satz 1, 2 sind bei vermögensrechtlichen Streitigkeiten auch in anderen Fällen entsprechend anzuwenden, soweit unter den Parteien die Höhe einer Forderung streitig ist und die vollständige Aufklärung aller hierfür maßgebenden Umstände mit Schwierigkeiten verbunden ist, die zu der Bedeutung des streitigen Teiles der Forderung in keinem Verhältnis stehen.

sect. 286 German code of civil procedure rules: Free appreciation of evidence:

(1) The court shall decide at its free discretion, by taking into account the whole substance of the proceedings and the results of any evidence taking, whether a factual allegation should be regarded as true or untrue. The grounds which prompted the court's conviction shall be stated in the judgment.
(2) The legal rules of evidence are binding on the court only in the cases indicated throughout this act.

sect. 287: Appraisal of damage; amount of demand:

(1) If it is controversial between the parties whether any damage was caused or the extent of the damage or of a compensable interest, it shall be decided by the court at its free discretion by taking into consideration all the circumstances. It is left to the discretion of the court whether and to what extent it should order a requested taking of evidence or procure ex officio the opinion of experts. The court may examine the party tendering the evidence concerning the damages or interest; the provisions of § 452 (1) first sentence and (2) to (4) apply mutatis mutandis.
(2) The provisions of subsection (1) sentences (1) and (2) are also analogously applicable in other cases of property disputes, to the extent that the amount of the demand is disputed between the parties and the full clarification of all determining circumstances involves difficulty which is disproportionate to the significance of the controversial part of the demand.
English translation: Goren 1990, 73-74.